Supreme Court, U.S.
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No. 00-312

IN THE

Supreme Court of the United States

MARGARET A. BAGLEY, WARDEN,

Petitioner,

v.

RONALD DEAN COMBS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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I. STATEMENT OF THE CASE

A. Introduction

On July 31, 1987, Respondent, Ronald Dean Combs was indicted by the Hamilton County, Ohio Grand Jury on two counts of aggravated murder, each carrying a death penalty specification. On February 22, 1988, after a trial infested with grave, and pervasive constitutional errors, the jury returned a verdict imposing a sentence of death. After a decade of efforts to remedy these grievous errors, on February 23, 2000, the United States Court of Appeals for the Sixth Circuit put an end to this constitutional charade, and granted Respondent's writ of habeas corpus. Now, in a final and desperate attempt to salvage patently defective decisions rendered below, Petitioner has simply ignored the factual record of these proceedings, and mischaracterized the applicable law. When the actual record is reviewed in light of the relevant case law, it is clear that the Petition for a Writ of Certiorari (the "Petition") should be denied.

B. Constitutional Errors Committed During The Trial

1. Ineffective Assistance Of Counsel

Mr. Combs' sole defense at trial was that he was so intoxicated that he was incapable of forming the intent and purpose necessary for a capital conviction. While the presentation of a cogent intoxication defense was therefore essential, Mr. Combs' trial counsel—who had never previously handled a death penalty case and was subsequently suspended from the practice of law—failed miserably in this effort throughout the trial proceedings. *Cincinnati Bar Ass'n v. Stidham*, 721 N.E.2d 977 (Ohio 2000).

a. Failure To Object To Or Remedy The Impermissible Use Of Mr. Combs' Statement "Talk To My Lawyer"

One of the starkest examples of trial counsel's ineffectiveness was in the failure to object to not only the prosecutor's elicitation and use of Mr. Combs' statement "talk to my lawyer" to prove

Combs acted with purpose and prior calculation and design, but also the trial court's subsequent instruction to the jury that they could consider the statement for just that purpose. During its case-in-chief, the prosecutor called Cincinnati police officer Douglas Ventre to the stand. Officer Ventre testified:

> After the rescue unit had gotten there and gotten him [Mr. Combs] on the stretcher and wheeled him back to about here behind the vehicle, I asked him again, he was laying on the stretcher and I was over top of him I asked him again to tell me what happened and he told me talk to his lawyer.

(Transcript ("TR") 1045.)[1] There was no defense objection. Immediately after Officer Ventre had concluded his testimony, the trial court, *sua sponte*, instructed the jury as follows:

> You may consider this evidence, however, as it relates to the elements of purpose and prior calculation and design, but what weight you give to this testimony depends upon your findings and the weight that you attribute to his testimony in this regard so please remember that.

(TR 1052 (emphasis added).) Again, there no was defense objection.

And, while defense counsel (albeit feebly) attempted to show that Mr. Combs was too intoxicated to form the requisite intent to commit capital murder during closing arguments, the prosecutor relied heavily on the "talk to my lawyer" statement to refute Mr. Combs' intoxication defense. Incredibly, defense counsel again stood by silently as the prosecutor emphasized in his closing argument:

> Talk to my lawyer. Talk to my lawyer. Does that sound like someone who's so intoxicated that he doesn't know what is going on? Isn't that evidence that he realizes the gravity of the

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[1] Selected portions of the trial transcript were lodged with the Court by Petitioner and additional relevant portions have been lodged by Respondent.

> situation and at [the] time gave that particular comment or response to Officer Ventre.

(TR 1255.)

b. Failure To Investigate, Object To, Or Avoid Repetition Of Dr. Fisher's Testimony

Trial counsel's ineffective representation was also evident in the devastating opinion testimony that was provided by Mr. Combs' own expert witness, Dr. Roger Fisher, on the ultimate issue during the culpability phase — Mr. Combs' intent. Trial counsel testified that he put Dr. Fisher on the stand for the express purpose of establishing that Mr. Combs "'Could not act purposely and intentionally because of his diminished capacity.'" *Combs v. Coyle*, 205 F.3d 269, 288 (6th Cir. 2000) (quoting Stidham deposition). However, trial counsel admitted that he had no idea before trial that Dr. Fisher's opinion was exactly the opposite, and was "surprised" by Dr. Fisher's testimony. *Id.* As a result of trial counsel's gross negligence, on four separate occasions testimony was elicited from Dr. Fisher that Mr. Combs acted "intentionally" and "purposefully" on the day of the offenses. (TR 1183, 1188, 1385, 1388.)

During closing argument in the culpability phase of the trial, the prosecutor relied heavily upon Dr. Fisher's concessions, emphasizing them on three separate occasions, including the following statement, to establish the elements of purposefulness and prior calculation and design:

> In fact the defendant's own expert Dr. Fisher who testified about he interviewed the defendant, really into a lot of what was said there but he did conduct this interview and he said yes, based on what he is told the defendant may have been under the influence, but also based on what he was told this man intentionally and purposefully killed those women. That's the testimony from his own witness . . . .

(TR 1226-27; *see also* TR 1233-34, 1250-51.)

Were this not bad enough, during the sentencing phase, trial counsel elicited the same improper testimony on direct examination. (TR 1385.) Again, the prosecutor seized on the opportunity to have Dr. Fisher express agreement that "[the defendant] was capable of purposeful action, of forming insight" and that he intended to do what he did. (TR 1388.)

c. Failure To Object To Erroneous Jury Instructions

Trial counsel also failed to object to, or preserve for appeal, the trial court's erroneous jury instructions at the close of the culpability phase:

> The defendant maintains that he did not act purposely and he did not act with prior calculation and design because he was intoxicated and under the influence of drugs. Intoxication exists when a person consumes a quantity of intoxicating beverage containing alcohol sufficient to adversely effect his mental process and actions and to deprive him of that clearness of intellect and control of himself that he would have otherwise possessed. . . . [U]pon the issue the burden of proof is upon the defendant to establish by a preponderance or greater weight of the evidence that at the time in question he was so influenced by alcohol and drugs that he was incapable of forming a purpose to commit the offense and was also incapable of killing [the victims] with prior calculation and design.

(TR 1269-71; *see also* TR 1277.) The instruction was constitutionally defective because it shifted to Mr. Combs the burden of disproving an element of the State's case. *See Engle v. Isaac*, 456 U.S. 107 (1982). Again, trial counsel did not object or preserve this error for appeal and, indeed, admitted that he was unaware of the necessity of raising objections upon the completion of the trial court's instructions.

d. Concession Of Mr. Combs' Guilt

Trial counsel's concession of Mr. Combs' guilt during the culpability phase also constituted ineffective representation. At the

inception of the culpability phase, Mr. Combs' counsel "surrendered the sword" by framing the issue before the jury as whether Mr. Combs should live or die, an issue irrelevant to the culpability phase. (TR 915.) This concession was not lost on the prosecutor, who fully exploited it in closing statement: "In fact even in opening statements I believe defense counsel alluded to the fact there is really no question that this was a purposeful or intentional killing." (TR 1227.) Even the trial court attempted to explain to counsel that he was conceding murder and purpose. (TR 1134-35.) Yet again, counsel stood idly by while Mr. Combs' constitutional rights were thrown aside.

e. Failure To Suppress Or Object To Inadmissible Statements Attributed To Mr. Combs

Trial counsel also failed to seek to suppress, object to or remedy certain evidence that was highly prejudicial to Mr. Combs' defense. For example, trial counsel failed to seek to suppress two statements attributed to Mr. Combs, or to even object to their introduction into evidence. First, a paramedic testified that, when he arrived at the crime scene, Mr. Combs was uncooperative and hostile and indicated that his name was "Doc Holiday." (TR 1059.) Second, an intensive care nurse testified that, shortly after surgery necessitated by five gunshot wounds, Mr. Combs referred to the victims as "bitches" and "whores" and stated that they deserved to die. (TR 1089-90.)

Both statements should have been excluded because Mr. Combs' physical condition and the presence of law enforcement personnel rendered the statements involuntary and inherently unreliable. The paramedic conceded that Mr. Combs' condition was "poor" and "shocky" due to loss of blood and low blood pressure, and that, in response to questions, Mr. Combs at times did not answer, or "would mutter sounds that were not distinguishable, couldn't figure out what he said." (TR 1059-60, 1067-68.) Similarly, the nurse acknowledged that Mr. Combs uttered the derogatory comments while recovering in the intensive care unit from various substances, the effects of surgery and anesthesia, and a dose of morphine administered just fifteen

minutes before he made the challenged statements. (TR 1088-89, 1093-95.) *See Mincey v. Arizona*, 437 U.S. 385, 398 (1978) (suppressing confession obtained from defendant hospitalized for abdominal gunshot wounds). At an absolute minimum, trial counsel should have sought to exclude these statements under the Ohio Rules of Evidence because their probative value—in light of Mr. Combs' physical condition—was clearly outweighed by their prejudicial effect.

f. Failure To Object To "Other Acts" Evidence

Trial counsel also made no effort to redact highly prejudicial portions of the videotaped deposition testimony of Tony Liming, Mr. Combs' cousin, introduced by the prosecutor. Liming, who was with Mr. Combs hours before the incident, was asked what his feelings were toward Mr. Combs. Liming responded: "He is, I guess I like him, I mean I liked him. He like did stuff, stole stuff from my mom and I didn't like that." (TR 944 (emphasis added).) Despite Liming's reference to Mr. Combs "stealing," trial counsel never sought to redact this portion of Liming's testimony as "other acts" evidence under Rule 404 of the Ohio Rules of Evidence.

g. Failure To Present Available Physical Evidence Of Intoxication

Trial counsel also failed either to introduce or secure the admission of important available physical evidence. For example, in his opening statement, trial counsel promised the jury that they would see documentary evidence of Mr. Combs' degree of intoxication. (TR 910.) Yet, despite the availability of this evidence counsel failed to introduce it. For example, while trial counsel intended to introduce a hospital report reflecting results of a blood alcohol test, (TR 1208-15), the prosecutor objected to the evidence based on lack of authentication. (TR 1208-11.) In response, trial counsel meekly argued "we don't feel that we have to bring anyone in to establish that they are authentic." (TR 1209.)

Other than trial counsel's failed attempt to introduce the blood alcohol tests, trial counsel did not investigate and present available physical evidence of Mr. Combs' intoxication at the time of the

shootings. At trial, the prosecutor introduced testimony from an officer that had conducted a search of Mr. Combs' car. (TR 1080-81.) The officer testified that he did not find any type of container used to hold alcohol. (*Id.*) Trial counsel presented no evidence to refute this testimony, again despite its availability. During post-conviction proceedings, Mr. Combs' mother testified that "when she got the car back from the police after their investigation there were wine cooler bottles, and beer cans in the car and that a cooler in the back still contained two beers." *Combs*, 205 F.3d at 289. Trial counsel later admitted that he did not learn of this evidence because he had not conducted an investigation for such evidence.

h. Failure To Secure Independent Psychological And Substance Abuse Expert Testimony

Trial counsel also failed to secure independent psychological and substance abuse expert testimony to explain Mr. Combs' diminished capacity on the day of the offenses. The only expert testimony proffered by trial counsel in support of Mr. Combs' defense came from Dr. Fisher, who was a court appointed psychologist. Even the most cursory investigation of Dr. Fisher's opinions would have led trial counsel to conclude that independent psychological expert testimony was essential. Also, a substance abuse expert would have testified that Mr. Combs suffered from a disorder known as Psychoactive Substance Dependency, which rendered him unable to control his behavior. The jury was never informed of Mr. Combs' disorder and its relationship to his offense.

i. Failure To Present Testimonial Evidence In Support Of Intoxication Defense

Trial counsel also failed to present evidence available from Mr. Combs' probation officer, Ms. Lang, that supported his intoxication defense. Mr. Combs' trial counsel failed to investigate, obtain and present admissible evidence that prior to the murder, Mr. Combs had a well-documented battle with substance abuse, and in fact had been subjected to, and consistently failed, drug and alcohol screens. In fact, results from

drug or alcohol tests performed during the summer of 1987—just days before the crime—were noted in Ms. Lang's files. Trial counsel was unaware of this evidence and did not obtain it or present it at trial.

j. Failure To Inform Jury Of Extent Of Mr. Combs' Substance Abuse

Finally, trial counsel failed to inform the jury of the full extent of Mr. Combs' substance abuse both immediately prior to the offense and historically. For example, trial counsel failed to account for the 50 Valium obtained by Mr. Combs from his aunt in the days preceding the offense, because trial counsel never questioned his aunt. Moreover, the wide array and sheer volume of substances historically abused by Mr. Combs was never placed before the jury. Nor did trial counsel explain that Mr. Combs frequently drove his car while under the influence of drugs. Evidence that Mr. Combs was a seasoned "under the influence" driver would have squarely contradicted the prosecutor's claim that Mr. Combs' ability to drive on the day of the offense was evidence of purposeful action. (TR 1252-54.)

2. Prosecutorial Misconduct

Mr. Combs was also subjected to a myriad of instances of constitutionally prohibited prosecutorial misconduct during the trial. During voir dire, the prosecutor repeatedly made incorrect statements of law, mischaracterizing the balancing and weighting of aggravating and mitigating factors required of Mr. Combs' jury. These errors continued during the sentencing phase. For example, the prosecutor improperly utilized victim impact evidence that was devoid of record support and designed to appeal to the passions of the jury. Having invited the jury to "think of the desperation of those women," (TR 1230), the prosecutor repeatedly speculated and improperly tendered victim impact evidence:

- "But think of their [Peggy and Joan's] last hours, think of their last ten minutes . . . were they now terrified." (TR 1402.)

- "Can you imagine the terror of that? A gun right to your head, was she [Joan] thinking of her husband, who was going to take care of him? Was she thinking about her childhood? Was she thinking about her daughter take me but spare Peggy? That's the aggravating circumstance, what she went through. Or maybe she started to pray, we don't know. He won't tell us." (TR 1404 (emphasis added).)

- "What did she [Peggy] think when this now hot steel pressed against the back of her head and she knew she too wasn't going to be given any mercy. What went through her mind, what was she thinking? Was she thinking of little Joey, who's going to take care of him, grandma is gone, I'm going to be gone who's going to raise my little boy. And then came the pull of that second trigger, and she's gone. That's the aggravating circumstance. . . ." (TR 1405 (emphasis added).)

- "What weighs more, these totally good lives or the defendant's life in the fast lane?" (TR 1406.)

In fact, while the prosecutor's closing argument spanned twelve transcript pages, six of them were devoted to uninterrupted and improper victim impact statements, (TR 1400-1406), the use of which constitutes reversible error under established Ohio law. *See, e.g., State v. Gumm*, 653 N.E.2d 253, 263-64 (Ohio 1995) (trial court would be well within its discretion to sustain an objection to prosecutor's invitation to jury to "imagine" or speculate on aspects of the case not in evidence—*i.e.*, the victim's final thoughts).

Here, the emotionally charged statement about the deceaseds' final moments, which the experienced prosecutor had to know were inadmissible, inflamed the jury and likely resulted in Mr. Combs' unconstitutional death sentence. Even the Ohio Supreme Court acknowledged that the prosecutor improperly injected victim impact evidence as an aggravating factor and engaged in "gross speculation." *Ohio v. Combs*, 581 N.E.2d 1071, 1077 (Ohio 1991). A death sentence predicated on such

inflammatory and improper evidence is constitutionally unreliable. *Satterwhite v. Texas*, 486 U.S. 249, 258 (1988).

In addition, the prosecutor improperly transformed the nature and circumstances of the offense into a nonstatutory aggravating factor. In Ohio, a defendant must be found guilty of at least one statutorily defined "aggravating circumstance" as set forth in Ohio Rev. Code §§ 2929.04(A)(1) - (8). Only then is the defendant "death-eligible." The jury must weigh the applicable aggravating factors and mitigating circumstances. Prosecutors must not advise juries that the aggravating circumstances placed on one side of the balance included "everything" that surrounds this crime, or "all the nature and circumstances of this crime" or comparable phraseology. *See Gumm*, 653 N.E.2d at 263.

The prosecutor, however, did just that. For example, the prosecutor stated to the jury "you will find beyond a reasonable doubt that the aggravating circumstances, the horror, the terror that surrounded this crime outweigh any mitigation . . . ." (TR 1303-04.) The prosecutor also argued "you haven't heard any mitigating factors in this case to justify brutally and in cold blood murdering two people . . . ." (TR 1426.) These statements were misleading and prejudicial. The purpose of mitigating factors is not to justify, but to demonstrate that the defendant deserves a sentence less than death. Moreover, the prosecutor implied that the jury should weigh the mitigating factors against the "brutal" nature of the offense.

The prosecutor also improperly commented upon Mr. Combs' unsworn statement provided for the sentencing phase of the trial. When a capital defendant elects to make an unsworn statement, the prosecutor's comments are limited solely to the fact that the statement was not made under oath. *State v. DePew*, 528 N.E.2d 542, 554 (Ohio 1988). In commenting at great length upon the unsworn statement and how he was not being permitted to cross examine Mr. Combs, (TR 1419-20), the prosecutor violated Mr. Combs' Fifth Amendment rights as well as his statutory right to make an unsworn statement. Ohio Rev. Code § 2929.03(D)(1). This misconduct was not brief or isolated. In fact, the prosecutor

did not miss the opportunity to make the same point under the guise of pointing out that Mr. Combs had not established statutory mitigating factors. (TR 1398.) Again, the prosecutor's improper argument infected the sentencing phase rendering Mr. Combs' sentence unreliable.

Lastly, the prosecutor improperly addressed and emphasized certain aggravating circumstances. In contrasting one aggravating circumstance (Ohio Rev. Code § 2929.04(A)(5) (killing two people in the same course of conduct)) with inapplicable statutory aggravators, the prosecutor referred to this factor as "the one that is perhaps the most serious." (TR 1395.) This was improper, as the Ohio legislature has never declared one aggravating factor more serious than another. *See State v. Davis*, 528 N.E.2d 925, 936 (Ohio 1988).

While each of the individual instances cited above warranted reversal of Mr. Combs' capital sentence, this case did not involve one, or a few isolated brief episodes, of such constitutional misconduct. To put it simply, the jury considered Mr. Combs' sentence in an environment tainted by prosecutorial misconduct.

3. Trial Court Errors

The trial court also committed a host of constitutional errors, but perhaps none were so damning as the instruction that the jury could consider the "talk to my lawyer" statement as evidence that Mr. Combs' acted purposefully and with prior calculation and design. Indeed, immediately after Officer Ventre had concluded his testimony, the trial court *sua sponte*, instructed the jury as follows:

> You may consider this evidence, however, as it relates to the elements of purpose and prior calculation and design but what weight you give to this testimony depends upon your findings and the weight that you attribute to his testimony in this regard so please remember that.

(TR 1052 (emphasis added).)

The trial court's instructions erroneously permitted the jurors to consider the statement as substantive evidence of Mr. Combs' guilt, in violation of his Fifth Amendment rights. *Miranda v. Arizona*, 384 U.S. 439 (1966); *see also Harris v. New York*, 401 U.S. 222, 224 (1971) ("*Miranda* barred the prosecutor from making its case with statements of an accused made while in custody prior to having or effectively waiving counsel"); *Griffin v. California*, 380 U.S. 609, 615 (1965) (Fifth Amendment precludes prosecutor from using defendant's silence as substantive evidence of guilt). The jury was instructed to consider the statement on two elements—purpose and prior calculation and design—that were necessary to convict Mr. Combs of aggravated murder and render him eligible for the death penalty. *See* Ohio Rev. Code § 2903.01(A). It can hardly be argued that the instructions were harmless because Mr. Combs' intoxication, and its effect on his mental state, were crucial to his conviction and sentence of death.

The trial court also committed serious error during the sentencing phase by instructing the jury on all seven statutory mitigating factors rather than on only the two mitigating factors raised by Mr. Combs (TR 1434-36), in contravention of Ohio law. *DePew*, 528 N.E.2d at 557. The trial court's penalty phase charge encouraged the jury to infer that the existence of relatively few applicable statutory mitigators weighed in favor of the death penalty.

C. Appellate Errors

The responsibilities imposed on appellate counsel in a death penalty case are heavy. Where a forceful claim of error is omitted on direct appeal, the omission undermines a capital defendant's appellate rights by increasing the risk of procedural default or review under a more stringent plain error standard. Appellate counsel's obligation is thus to preserve claims as the client's very life is at stake. Yet, Mr. Combs' constitutional right to appellate review was rendered meaningless by the ineffective and inadequate representation that he received on direct appeal, in large part because he was represented by the same counsel who

mishandled his trial. Indeed, Mr. Combs' appellate counsel omitted several of the meritorious claims discussed *supra* relating to the ineffectiveness of trial counsel, trial court errors, and prosecutorial misconduct; errors of such constitutional magnitude that they should have been, but were not, raised by Mr. Combs' appellate counsel.[2] And many of the errors that trial counsel did raise on appeal were subject to the "plain error" standard because trial counsel had neglected to make the requisite objections at trial.

This situation would have been avoided had counsel merely acceded to his client's wishes that he step aside as counsel. The right to counsel under the Sixth Amendment entails "a correlative right to representation that is free from conflicts or interest." *Wood v. Georgia*, 450 U.S. 261, 271 (1987). Such a right is violated when a defendant's attorney has a potential conflict of interest that results in prejudice to the defendant, or an actual conflict of interest that adversely affects the attorney's performance. *Id.* at 271-72. When Mr. Stidham failed to remove himself as appellate counsel upon Mr. Combs' request, an actual conflict of interest arose, as the attorney's and defendant's interest actually "diverge[d] with respect to a material factual or legal issue or to a course of action." *Cuyler v. Sullivan*, 446 U.S. 335, n.3 (1980).

D. The Ohio State Appellate Proceedings

Despite the constitutionally inadequate representation, on direct appeal the Ohio Supreme Court agreed that numerous errors were committed during the trial. First, the court recognized that trial court erred in failing to object to the prosecutor's use of the "talk to my lawyer" statement on at least one of three separate grounds. The court agreed that the statement stemmed from an improper custodial interrogation under *Miranda*. *Combs*, 581 N.E.2d at 1075-76. In addition, the court agreed that the prosecutor's use of

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[2] Although a few examples of ineffectiveness were assigned as error on direct appeal, the full panoply of trial counsel's errors and omissions was never placed before the appellate court.

the statement violated Mr. Combs' Fifth Amendment rights under *Griffin v. California*. *Id.* at 1076. The court also agreed that the statement was inadmissible under Rule 401 and 403 of the Ohio Rules of Evidence. *Id.*

Second, the court concluded that the trial court erred in allowing the "talk to my lawyer" statement into evidence and instructing the jury to consider the remark in relation to purpose and prior calculation and design. *Id.* Third, the court agreed that the prosecutor erred by improperly suggesting "that how the victims were killed and the suffering and mental anguish the victims endured was an aggravating circumstance." *Id.* at 1077. Yet, inexplicably, the court held that these errors did not rise to the level of "plain error," a standard which would not have applied but for the failure of trial counsel to make the requisite objections at trial. *Id.* at 1075-77. Two members of the court disagreed with the majority's decision, stating, "the prosecutorial misconduct graphically outlined by the majority simply cannot be passed off as harmless error beyond a reasonable doubt." *Id.* at 1084 (Wright, J., and Brown, J., dissenting).

E. The Federal Habeas Proceedings

After exhausting his state court remedies, Respondent sought habeas corpus relief in the federal courts. The United States District Court for the Southern District of Ohio denied habeas relief, agreeing with the Ohio Supreme Court that any error was harmless. The United States Court of Appeals for the Sixth Circuit reversed and ordered a conditional habeas writ, subject to a new trial. The Sixth Circuit initially discussed numerous trial counsel errors establishing ineffective assistance of counsel. First, the court held that Mr. Combs' Sixth Amendment rights were violated by trial counsel's failure to object to the prosecutor's use of the "talk to my lawyer" statement and the court's attendant instruction to the jury. *Combs*, 205 F.3d at 286-87. Agreeing with the Ohio Supreme Court, the Sixth Circuit found that Mr. Combs was in custody and entitled to *Miranda* warnings:

> Even assuming that the Fifth Amendment is inapplicable to precustody contexts, the privilege would still be applicable to Combs, for we agree with the Ohio Supreme Court's finding that Combs was in custody at the time he made the "talk to my lawyer" statement.

Id. at 284. The court also held that Mr. Combs' Fifth Amendment right to silence was also violated under *Griffin v. California*, when the prosecutor used the statement in the its case-in-chief to prove guilt. *Id.* at 286. The court also agreed that the statement was inadmissible under Ohio Rule of Evidence 403, stating that "a reasonable attorney would have known that the admission of the 'talk to my lawyer' statement was prejudicial and would have objected on the basis of Rule 403." *Id.* at 287.

The Sixth Circuit separately held that Mr. Combs' Sixth Amendment rights were violated by trial counsel's failure to anticipate, suppress, prepare for, object to or avoid repetition of Dr. Fisher's testimony on the issue of intent. The Sixth Circuit explained, "Fisher's opinion regarding whether Combs lacked the requisite intent to commit the crimes was crucial to the defense theory; defense counsel's failure to have questioned Fisher in this regard prior to trial is inexcusable. Defense counsel should have known Dr. Fisher's opinion on this ultimate issue and should have prepared accordingly." *Id.* at 288. According to the court, trial counsel's decision to put Dr. Fisher on the stand was "objectively unreasonable" as "Fisher's testimony destroy[ed] any hope of a successful intoxication defense" and actually "helped the prosecution to establish one of the elements of its case in chief." *Id.*

The Sixth Circuit also determined that trial counsel had committed numerous other errors. Two specific examples cited by the court concerned trial counsel's failure to i) investigate and present available physical evidence of Mr. Combs' intoxication on the day of the shootings, and ii) redact portions of the videotaped testimony of Tony Liming that were so prejudicial to Mr. Combs. *Id.* at 288-89. The occurrence of several other errors led the court to describe trial counsel's "overall performance" during the

culpability phase of the trial as "shocking." *Id.* at 289. Based upon its extensive analysis, the Sixth Circuit concluded that Mr. Combs was prejudiced by these numerous errors and that "absent defense counsel's errors, there is a reasonable probability that the jury would have concluded that the State did not meet its burden of proving the two contested elements, and thus that the jury would have had a reasonable doubt about Combs's guilt." *Id.* at 291.[3]

II. REASONS FOR DENYING THE PETITION

A. The Court Should Deny The Petition Because The Sixth Circuit's Decision Is Supported By The Totality Of Constitutional Deprivations

At the outset, what is simply ignored in the Petition is that the issues framed by Petitioner need not be reviewed by this Court because the Sixth Circuit's decision to grant Mr. Combs habeas relief was premised upon a totality of constitutional deprivations. While Petitioner attempts to create the impression that Mr. Combs' habeas petition was grounded on but two discrete errors, the record demonstrates the myopia of this position. To be sure, Mr. Combs was deprived of his constitutional rights by the admission of the "talk to my lawyer" statement and trial counsel's presentation of Dr. Fisher's expert testimony. However, the record before the Sixth Circuit established that every facet of Mr. Combs' trial and appeal was infected by gross violations of Mr. Combs' constitutional rights. Indeed, the pervasiveness of constitutional violations was not lost on the Sixth Circuit, which acknowledged the litany of errors committed by Mr. Combs' trial counsel, as well as the occurrence of prosecutorial misconduct and trial court errors.

The Sixth Circuit plainly recognized that Mr. Combs was subjected to a broad range of errors. At the outset, the Sixth

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[3] The Sixth Circuit did not confine its analysis to the claims of ineffective assistance of counsel, as it also found the trial court errors to be pervasive. *Combs*, 205 F.3d at 291-93.

Circuit found that trial counsel's failure to object to the "talk to my lawyer" statement as well as his presentation of Dr. Fisher's testimony, were independently sufficient to satisfy both the "deficiency" and "prejudice" components of the ineffective assistance of counsel test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Combs*, 205 F.3d at 288-90. The court then probed beyond these errors, devoting a separate section to trial counsel's "overall performance" during the culpability phase. *Id.* at 288-90. Here, the court concluded that there were numerous "other failures" on the part of trial counsel that compounded the most grievous of the errors. *Id.* at 289. By way of example, the court highlighted trial counsel's failure "to investigate and to present available physical evidence of Combs's intoxication on the day of the shootings." *Id.* The Sixth Circuit explained that trial counsel failed to investigate and discover the presence of alcohol containers in the car, depriving Mr. Combs of the ability to present crucial corroborating physical evidence of intoxication.[4] *Id.*

As a second example, the court noted trial counsel's failure to attempt to redact prejudicial portions of Tony Liming's videotaped deposition testimony. *Id.* Specifically, the court explained that Liming's references to Mr. Combs "stealing stuff" was excludable under Ohio Rule of Evidence 404(B), which precludes the admission of evidence of "other crimes, wrongs or acts . . . to prove the character of a person in order to show that he acted in conformity therewith." *Id.*; Ohio R. Evid. 404(B). The court concluded that, "considering the potential prejudice from the statement, counsel clearly erred by failing to seek redaction." *Combs*, 205 F.3d at 289.

Thus, it is clear that the Sixth Circuit recognized the constitutionally deficient representation afforded to Mr. Combs during his trial and appeal. Indeed, this is precisely what led the court to describe trial counsel's "overall performance" as "shocking." *Id.*

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[4] As the Sixth Circuit noted, trial counsel failed to present any corroborating physical evidence at trial. *Combs*, 205 F.3d at 289, n.13.

In addition to recognizing the failings of trial counsel, the Sixth Circuit also acknowledged the existence of prosecutorial misconduct and errors by the trial court. The court agreed that the trial court erred by providing jury instructions on all seven of the statutory mitigating factors, as opposed to only the two mitigating factors raised by Mr. Combs. *Id.* at 292. The court also agreed that the prosecutor committed error by focusing its closing remarks on the victim's mental anguish prior to death, thereby converting the nature and circumstances of the offense into a nonstatutory aggravating circumstance. *Id.* In fact, the court found these errors were so serious so as to admonish the prosecutor to "avoid such speculation at retrial." *Id.* at 293.

In short, Petitioner's efforts to recast the record aside, the Sixth Circuit found meritorious claims relating to three crucial categories of error—ineffective assistance of counsel, prosecutorial misconduct and trial court errors.

B. The Court Should Deny The Petition Because The Sixth Circuit Held That Errors Concerning Both The "Talk To My Lawyer" Statement And The Presentation Of Dr. Fisher's Testimony Constituted Independent Violations Of Mr. Combs' Sixth Amendment Rights

Even if this case was, as Petitioner blindly claims, confined to but the two errors, certiorari review would still be inappropriate. While recognizing that the "overall performance" of Mr. Combs' trial counsel was "shocking," the Sixth Circuit focused primarily on two of the more grievous errors committed by trial counsel: i) the failure to object to the "talk to my lawyer" statement; and ii) the presentation of Dr. Fisher's testimony. The Sixth Circuit expressly held that each of these two errors constituted an independent violation of Mr. Combs' Sixth Amendment rights. *Id.* at 288-89. Thus, for example, even if trial counsel's failure to object to the "talk to my lawyer" statement somehow did not violate Mr. Combs' Sixth Amendment rights, the Sixth Circuit would nevertheless have granted habeas relief based solely on trial counsel's failure to anticipate, suppress, prepare for, object to or

avoid repetition of the damning testimony of Dr. Fisher.[5] As review of but one of the two questions presented would result in the court rendering an advisory opinion, the Petition should be denied.

C. The Court Should Deny The Petition On The First Question Presented Because Independent Bases Exist For Concluding That Trial Counsel's Failure To Object To The "Talk To My Lawyer" Statement Deprived Mr. Combs Of His Sixth Amendment Rights

Petitioner contends that trial counsel's failure to object to the "talk to my lawyer" statement could not have constituted ineffective assistance of counsel under *Strickland* because, according to Petitioner, the prosecutor's use of "pre-*Miranda*" silence as part its case-in-chief did not violate Mr. Combs' Fifth Amendment rights. In other words, trial counsel could not have been ineffective in failing to make an objection that was legally infirm. However, Petitioner ignores the fact that there were at least two independent objections that trial counsel clearly should have made in connection with the "talk to my lawyer" statement, irrespective of whether an objection based upon the Fifth Amendment question presented by Petitioner was meritorious.

1. Failure To Object Based On *Miranda* Warnings Violation

First, the prosecutor's use of the "talk to my lawyer" statement was objectionable because the statement was the fruit of a custodial interrogation that occurred before Officer Ventre provided Mr. Combs the required *Miranda* warnings. Thus, the instant case is fundamentally different from the line of so-called "pre-*Miranda*" silence cases embraced by Petitioner because it

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[5] Indeed, Circuit Judge Norris did just that when he concurred with the majority's decision to issue a writ of habeas corpus based solely on trial counsel's presentation of Dr. Fisher's testimony. *Combs*, 205 F.3d at 293 (Norris, J., concurring in part and dissenting in part).

involves a situation where *Miranda* warnings were not given, but were required. In *Miranda*, the Court held that statements made in response to interrogation while an individual is in custody are inadmissible unless the suspect is specifically informed of his *Miranda* rights and voluntarily elects to forgo those rights. 384 U.S. at 478-79. Thus, the central inquiry under *Miranda* is whether the suspect was in custody (and therefore entitled to *Miranda* warnings) at the time of interrogation.

In the instant case there is no dispute that Mr. Combs was in custody at the time Officer Ventre asked Mr. Combs "What happened?" and elicited the "talk to my lawyer" statement. Both the Ohio Supreme Court and the Sixth Circuit reached this inescapable conclusion; and Petitioner expressly conceded the issue in the Petition. (Pet. at 8, n.5.) Having determined that Mr. Combs was in custody, the Ohio Supreme Court and Sixth Circuit had no trouble concluding that, at the time Officer Ventre elicited the "talk to my lawyer" statement, Mr. Combs was entitled to *Miranda* warnings. The Ohio Supreme Court explained:

> [A]t the point when Combs was placed in the ambulance, we find that Combs was in custody and had a right to remain silent, consult a lawyer, and receive a *Miranda* warning. When he arrived at the scene, Officer Ventre personally took the shotgun from Combs; there were two women dead from the shotgun blasts in the adjacent car; and Ventre had been at the scene for some ten to fifteen minutes. Ventre's questioning, without a *Miranda* warning, violated those rights.

Combs, 581 N.E.2d at 1075-76 (emphasis added); *see also Combs*, 205 F.3d at 284-85 (explaining that *Miranda* warnings were required under circumstances presented).

Because Mr. Combs was entitled to, but failed to receive, *Miranda* warnings prior to being asked "What happened?," the response of "talk to my lawyer" was plainly inadmissible at trial. Thus, even assuming that trial counsel had no basis for objecting to the statement based on the Fifth Amendment question presented by Petitioner, he should have recognized that Mr. Combs had been

subjected to an improper custodial interrogation in violation of *Miranda*, and made the appropriate objection.

Recognizing that the presence of a *Miranda* warnings violation renders the first question presented moot, Petitioner contends that the "public safety exception" to *Miranda* somehow salvages its position. At the outset, Petitioner never raised this argument below, and thus it has been waived. *Aurer v. Robbins*, 519 U.S. 458, 464 (1997); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148 n.2 (1970). Regardless, neither the record nor the law supports Petitioner's eleventh hour attempt to disprove the existence of a *Miranda* warnings violation.

In *New York v. Quarles*, 467 U.S. 649 (1984), the sole case cited by Petitioner in support of its theory, the Court found that no violation of defendant's constitutional right had occurred when, immediately after placing the defendant in custody but before giving him *Miranda* warnings, officers asked the defendant the location of a gun that the officers knew he had hidden. *Id.* at 655-56. The Court explained that the need to eliminate the danger to public safety posed by the hidden gun took precedence over the suspect's constitutional right against self-incrimination. *Id.* at 657.

The instant case is readily distinguishable from the circumstances presented in *Quarles*. First, in *Quarles* the officers actually knew when they interrogated the suspect that he had hidden his weapon. *Id.* at 652. Here, when asking the offensive question, the officer had no specific knowledge of any public safety concern, such as a hidden gun. Second, in *Quarles* the officer immediately asked the defendant where the gun was upon taking him into custody. *Id.* Here, however, several minutes passed from the time that the officer disarmed Mr. Combs to the time that the officer asked the offensive question. Again, there is no evidence in the record that a legitimate public safety concern existed at the time of the question.

Third, in *Quarles* the officer asked only the question that was necessary to locate the concealed gun (*i.e.*, "where's the gun?) and quell the public safety concern. *Id.* at 649. Here, the officer's

question was anything but pointed. The question failed to address any specific public safety concern, and the breadth of the question makes clear that it was motivated by nothing more than a general desire to gather facts from the suspect. Finally, that the officer did not ask Mr. Combs any follow up questions addressing a particular public safety matter (*e.g.*, "Are there any other weapons?") serves to confirm that his question was not intended to address a legitimate fear for public safety. (TR 1046.) These crucial distinctions make clear that the public safety exception has no application here.

2. Failure To Object Based Upon The Ohio Rules of Evidence

Second, even if trial counsel failed to realize that the prosecutor's use of the "talk to my lawyer" statement constituted a *Miranda* warnings violation, trial counsel should still have objected to the statement on evidentiary grounds. Rule 403 of the Ohio Rules of Evidence provides that evidence, although relevant, must be excluded if its "probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Ohio R. Evid. 403(B). Here, despite the obvious prejudice posed by the prosecutor's use of the "talk to my lawyer" statement to prove prior calculation and design and purpose, trial counsel failed to seek exclusion of the statement under Rule 403(B). The Ohio Supreme Court and the Sixth Circuit both concluded that trial counsel erred in failing, at a minimum, to object to the "talk to my lawyer" statement under Rule 403.[6] The Sixth Circuit stated, "[a] reasonable defense attorney would have known that the admission of the talk to my

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[6] Petitioner states, without support, that the Ohio Supreme Court's holding is irrelevant because the court concluded that the error was "harmless." However, the Sixth Circuit clearly disagreed, concluding not only that the failure to object on evidentiary grounds was error, but also that the failure to make any objection at all satisfied the "prejudice" prong of *Strickland*. *Combs*, 205 F.3d at 290. Moreover, Petitioner ignores the fact that, because trial counsel was deficient in failing to object, the Ohio Supreme Court was forced to examine the issue under the "plain error" standard.

lawyer statement was prejudicial to the client and would have objected on the basis of Rule 403." *Combs*, 205 F.3d at 287. The Ohio Supreme Court reached a similar conclusion, stating, "Even if [the 'talk to my lawyer' statement] was initially admissible, Evid. R. 401 and 403 would otherwise invite exclusion from evidence." *Combs*, 581 N.E.2d at 1076.

It has been this Court's consistent rule "never to anticipate a question of constitutional law in advance of the necessity of deciding it . . . and never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985). Moreover, the Court has long recognized that "where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non federal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). Here, because the Ohio Supreme Court and the Sixth Circuit correctly recognized that two additional bases existed for objecting to the use of the "talk to my lawyer" statement, one of which involved the application of non-federal evidentiary rules, the Fifth Amendment question presented by Petitioner is not ripe for review.

D. The Court Should Deny The Petition On The First Question Presented Because The Case Does Not Present An Issue On Which There Exists A Conflict Among The Courts Of Appeals

Petitioner insists that there is a conflict among the courts of appeals that warrants review. According to Petitioner, ". . . the courts of appeals are sharply divided on the question whether pre-*Miranda* silence may be used in a prosecution's case-in-chief." (Pet. at 15.) However, closer scrutiny reveals that there is no conflict relating to any issue presented by this case.

First and foremost, this is not a "pre-*Miranda* silence" case; rather, this case involves the failure to provide *Miranda* warnings before a custodial interrogation. Thus, the case concerns whether

the prosecution may use as substantive evidence of guilt statements made in response to a custodial interrogation before *Miranda* warnings have been provided. Clearly the answer in this case is no, and Petitioner cites no authority to the contrary.

Second, even the purported "conflict" among the circuits on the Fifth Amendment question framed by Petitioner is illusory. While Petitioner has cobbled together decisions from various courts of appeals, the cases lack any common legal or factual thread relevant to the instant record. Most notably, Petitioner has admitted that Mr. Combs was in custody at the time he was questioned. (*See* Pet. at 8, n.5 ("We do not dispute that Combs was in custody when he made [the 'talk to my lawyer'] response").) Having done so, this case ceases to be a pre-arrest, pre-*Miranda* case. Thus, the pre-arrest silence cases relied upon by Petitioner to support its purported "conflict" are all inapposite. *See, e.g.*, *United States v. Zanabria*, 74 F.3d 590 (5th Cir. 1996); *United States v. Rederth*, 872 F.2d 255 (8th Cir. 1989); *United States v. Williams*, 405 F.2d 14 (4th Cir. 1968).

The remaining cases relied upon by Petitioner similarly do not support the proposition that silence can be used as substantive evidence of guilt. For example, in *Thomas v. Indiana*, 910 F.2d 1413 (7th Cir. 1990), the narrow holding was simply that *Wainwright v. Greenfield*, 474 U.S. 284 (1986), precluded the prosecution from using the defendant's post-*Miranda* silence as evidence of sanity. *Thomas*, 910 F.2d at 1417. Moreover, a year later the Seventh Circuit held that post-arrest, pre-*Miranda* silence could not be used by the prosecution as substantive evidence of guilt in its case-in-chief. *United States v. Hernandez*, 948 F.2d 316, 322-23 (7th Cir. 1991).

The Fourth Circuit's decision in *United States v. McNatt*, 931 F.2d 251 (4th Cir. 1991) was not even a Fifth Amendment right to silence case, but rather turned exclusively on the Fourth Amendment. *McNatt*, 931 F.2d at 256. Similarly, *United States v. Rivera*, 944 F.2d 1563 (11th Cir. 1991), was not decided on Fifth Amendment grounds as the defendant raised only a due process challenge. *Rivera*, 944 F.2d at 1567-69. Moreover,

Rivera relied exclusively on *Jenkins v. Anderson*, 447 U.S. 231 (1980), and *Fletcher v. Weir*, 455 U.S. 603 (1982), which are impeachment cases and do support the proposition that silence can be used as substantive evidence of guilt in the prosecution's case-in-chief. *Id.* at 1568, nn.11, 12.

In *United States v. Isaac*, 134 F.3d 199 (3d Cir. 1998), the Third Circuit did not analyze the type of "silence" at issue (*i.e.*, pre-arrest, pre-*Miranda* or post-*Miranda*). *Isaac*, 134 F.3d at 206-07. Moreover, the court explained that the prosecutor's comment was vague and "was not 'of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.'" *Id.* at 207. The court also cautioned that the prosecutor was permitted to comment upon a defendant's silence only because defense counsel attacked the credibility of the prosecution's witnesses. *Id.* The court explained that "when the defendant uses his *Griffin* protection as a sword, rather than a shield, the prosecution may respond appropriately." *Id.* Here, it is undisputed that the prosecutor's statement directly implicated Mr. Combs' right to silence. Futhermore, Mr. Combs never used his silence as a sword, requiring the prosecutor to respond.[7]

Finally, the only cases mentioned by Petitioner that even arguably resemble this case all confirm that post-arrest, pre-*Miranda* silence cannot be used in the prosecution's case-in-chief to prove guilt under the principles set forth in *Griffin* and *Miranda*. *See, e.g.*, *United States v. Whitehead*, 200 F.3d 634, 639 (9th Cir. 2000) ("when district court admitted evidence of

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[7] Petitioner contends that the use of the "talk to my lawyer" statement was permissible, in part, because the prosecutor used it as so-called "rebuttal" evidence. (Pet. at 13-15.) This distinction is without merit. Whatever the appropriate rubric may be, there is no dispute that the prosecutor used the statement in its case-in-chief as substantive evidence of guilt, *i.e.*, to show that Mr. Combs acted rationally and thus with purpose and intent. There is no authority for the proposition that the mere assertion of a defense is sufficient to open the door for the admission of otherwise inadmissible evidence of silence.

post-arrest, pre-*Miranda* silence, and when it allowed the government to comment on this silence in closing argument, it plainly infringed upon [the defendant's] privilege against self-incrimination"); *United States v. Moore*, 104 F.3d 377, 385 (D.C. Cir. 1997) ("custody and not interrogation is the triggering mechanism for the right of pretrial silence under *Miranda*. Any other holding would create an incentive for arresting officers to delay interrogation in order to create an intervening 'silence' that could then be used against the defendant"); *Hernandez*, 948 F.2d at 322 (holding that government may not use defendant's post-arrest, pre-*Miranda* silence against him as evidence of guilt).

E. The Court Should Deny The Petition On The Second Question Presented Because The Sixth Circuit's Finding Of Prejudice Raises No Novel Issues Under *Strickland* And Is Fully Supported By The Record

Lastly, Petitioner questions whether the Sixth Circuit correctly applied the two-part test announced in *Strickland* for evaluating claims of ineffective assistance of counsel. (Pet. at 19-26.) Petitioner insists that the Sixth Circuit erred in finding that the prejudice component of the *Strickland* test was satisfied by trial counsel's deficient handling of Dr. Fisher's testimony.[8] Under *Strickland*, the prejudice inquiry "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." 466 U.S. at 687. Further, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Petitioner contends that *Strickland's* "reasonable probability" test should be set aside. However, this issue was resolved in

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[8] Petitioner's discussion of Dr. Fisher's testimony as it pertains to prejudice ignores the Sixth Circuit's holding that trial counsel's failure to object to the "talk to my lawyer" statement was independently sufficient to satisfy the prejudice component under *Strickland*. *Combs*, 205 F.3d at 290.

Williams v. Taylor, 120 S. Ct. 1495 (2000), where the Court reaffirmed that the *Strickland* two-part test—including the "reasonable probability" standard—remains the law. *Id.* at 1512. The Court also rejected the need for a separate fundamental fairness inquiry. *Id.* at 1513.

The Court's decisions in *Lockhart v. Fretwell*, 506 U.S. 364 (1993), and *Nix v. Whiteside*, 475 U.S. 157 (1986), in no way warrant departing from *Strickland's* prejudice test in this case. These decisions simply recognize that the mere fact that the outcome of a trial may have been different but for counsel's behavior is not determinative of a Sixth Amendment violation where the behavior does not deprive the defendant of a right that he is actually entitled to under the law. For example, in *Lockhart*, the court held that prejudice was not demonstrated where the claimed ineffective assistance consisted of trial counsel's failure to make an objection during trial on a basis that was ultimately determined to be legally infirm. *Lockhart*, 506 U.S. at 372-73 (noting that case "concerns the unusual circumstance where the defendant attempts to demonstrate prejudice based on considerations that, as a matter of law, ought not inform the inquiry") (O'Connor, J., concurring). Similarly, in *Nix* the Court found no prejudice where the claimed ineffective assistance consisted of trial counsel refusing to assist the defendant in presenting perjured testimony. *Nix*, 475 U.S. at 175; *see also Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986) (noting that "a meritorious Fourth Amendment claim is necessary to the success of a Sixth Amendment claim").[9]

Here, Mr. Combs undoubtedly had a right to have his attorney investigate the opinions of his only expert on the sole defense proffered. *See Strickland*, 466 U.S. at 691 ("counsel has a duty to

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[9] Justice Powell's concurrence in *Kimmelman*, and the Seventh Circuit's decision in *Holman v. Page*, 95 F.3d 481 (7th Cir. 1996), concerned Fourth Amendment considerations relating to the admission of physical evidence that are not present in this case. *Kimmelman*, 477 U.S. at 391-92 (Powell, J., concurring); *Holman*, 95 F.3d at 490-91.

make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary"); *see also Williams*, 120 S. Ct. at 1514-15 (ineffective assistance based on trial counsel's failure to investigate).[10] Additionally, unlike *Lockhart*, there remains a well-established legal basis for objecting to Dr. Fisher's testimony on the ultimate issue. *State v. Slagle*, 605 N.E.2d 916, 927 (Ohio 1992) (holding that opinion testimony on ultimate issue of specific intent is inadmissible during guilt phase of criminal trial).

Apart from contending that the Sixth Circuit should have applied a modified *Strickland* analysis, Petitioner is left arguing that the Sixth Circuit's decision was erroneous based on the particular facts of the case. Petitioner has identified no conflict among the courts of appeals on an issue of fact presented by this case concerning prejudice under *Strickland*. Certiorari review is ordinarily not appropriate when "the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

Nevertheless, there is no doubt that the Sixth Circuit properly applied the *Strickland* prejudice test. Petitioner's query—"Can it count as prejudicial under *Strickland* that a defense witness on cross-examination provides testimony that confirms the defendant's guilt?" (Pet. at 19)—unfairly diminishes the devastating effect that Dr. Fisher's testimony had on Mr. Combs' intoxication defense. First, Dr. Fisher was not just any defense witness—he was Mr. Combs' expert witness, and, indeed, the only expert witness providing testimony on Mr. Combs' behalf on the only defense proffered. Second, the testimony elicited was not just any testimony, but rather went to the ultimate issue of the

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[10] The Court in *Williams* did not distinguish between so-called exculpatory and inculpatory evidence, nor has Petitioner identified a conflict among the circuits on such a basis. In any event, *Williams* did not, as Petitioner suggests, involve "exculpatory" evidence, but rather concerned trial counsel's failure to investigate and present mitigation evidence during the sentencing phase. *Id.* at 1514.

case—Mr. Combs' intent. In essence, Dr. Fisher testified that Mr. Combs had no legitimate defense. Third, the testimony did not merely "confirm" guilt; it actually helped the prosecutor establish the elements of its case-in-chief.[11]

While the gravity of trial counsel's errors somehow escaped Petitioner, they were not lost on the Sixth Circuit, which correctly recognized that Dr. Fisher's testimony, as well as the "talk to my lawyer" statement, completely undermined Mr. Combs' ability to establish the absence of intent and purpose, and altered the entire evidentiary landscape of Mr. Combs' defense. *Combs*, 205 F.3d at 290-91. At the same time, the court fully appreciated the prosecutor's heavy reliance upon this evidence to establish intent. *Combs*, 205 F.3d at 279, 288-89.

The remaining evidence that the prosecutor submitted on purpose and intent was far less probative and, as the Sixth Circuit noted, was squarely refuted by credible testimony that Mr. Combs was suicidal. *Combs*, 205 F.3d at 290. Moreover, Petitioner ignores the fact that other errors committed by trial counsel (*e.g.*, the failure to investigate the existence of corroborating physical evidence) prevented Mr. Combs from marshaling an even stronger intoxication defense. *Williams*, 120 S. Ct. at 1515. In short, the record before the Sixth Circuit fully supported the court's conclusion that, but for trial counsel's errors, "there was a reasonable probability that the jury would have concluded that the State did not meet its burden of proving" the elements of its case. *Combs*, 205 F.3d at 291.

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[11] The fact that Dr. Fisher was a defense witness is irrelevant. Trial counsel did not make a strategic decision to call a witness knowing that the witness might provide unfavorable testimony on cross-examination. Rather, trial counsel admitted that, due to his failure to investigate, he had no idea Dr. Fisher believed that Mr. Combs acted with purpose and intent. *Combs*, 205 F.3d at 288.

III. CONCLUSION

For all of these reasons, the Petition should be denied.

Respectfully submitted,

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